

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of JORDYN AUSTIN COATS, a/k/a  
JORDYN AUSTIN HORTON, Minor.

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JENNIFER LYNN HORTON and CHAD  
MICHAEL HORTON,

UNPUBLISHED  
June 21, 2005

Petitioners-Appellants,

v

TEDDY EDWARD WILDER,

Respondent-Appellee.

No. 260917  
Barry Circuit Court  
Family Division  
LC No. 04-002807-AY

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Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Petitioners appeal as of right the trial court's order granting respondents' motion for summary disposition and dismissing their petition for stepparent adoption and to terminate respondent's parental rights. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Petitioner Jennifer Horton and respondent, who never married, are the parents of a child born on March 20, 1997. Respondent was ordered to pay child support in the amount of \$85 per week, to provide insurance for the child, and to pay fifty percent of any unreimbursed medical expenses for the child. The support order provided that respondent's parenting time would be suspended automatically any time he failed to pay support as ordered.

On May 20, 2004, petitioners filed a petition seeking to terminate respondent's parental rights and to allow Chad Horton, who married Jennifer Horton on November 9, 2002, to adopt the child. The petition indicated that respondent had failed to substantially comply with the support order for a period of two years before the petition was filed. Respondent moved for summary disposition pursuant to MCR 2.116(C)(10), emphasizing that Friend of the Court (FOC) records indicated that he had made regular child support payments in the two years before the petition was filed, and had reduced his arrearage in that period as well. Furthermore, he noted that his parenting time was suspended automatically because a support arrearage existed. Respondent sought sanctions pursuant to MCR 2.114(E) and (F) on the grounds that petitioners' petition falsely stated that he had not made regular support payments in the last two years, and that petitioners' claim was frivolous. In response, petitioners asserted that respondent's

conviction of failure to pay child support<sup>1</sup> constituted evidence that he failed to pay support for the child. The trial court granted respondent's motion and dismissed the petition, finding that the FOC records showed that respondent made regular child support payments in the two-year period prior to the filing of the petition. The trial court declined to impose sanctions.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

If the parents of a child are unmarried but the father acknowledges paternity, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court, upon notice and hearing, may issue an order terminating the parental rights of the other parent if: (1) the other parent, having the ability to support or assist in supporting the child, has failed or neglected to provide regular and substantial support for the child or, if a support order has been entered, has failed to substantially comply with the order for a period of two or more years before the filing of the petition; and (2) the other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of two years or more before the filing of the petition. MCL 710.51(6). To terminate parental rights, the court must find both a failure to provide support and a failure of contact with the child. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001).

In a termination of parental rights proceeding under MCL 710.51(6), the petitioner has the burden of proving by clear and convincing evidence that termination of the noncustodial parent's rights is warranted. We review the lower court's findings of fact under the clearly erroneous standard. Upon a showing of the requisite proofs, termination of parental rights under MCL 710.51(6) is permissive rather than mandatory. The court need not grant termination if it finds that doing so would not be in the child's best interest. *Id.* at 271-273.

We affirm. The two-year period referred to in MCL 710.51(6) is measured from the date of the filing of the petition. See *In re Caldwell*, 228 Mich App 116, 120; 576 NW2d 724 (1998). The petition for stepparent adoption and to terminate respondent's parental rights was filed on May 20, 2004. The felony complaint issued in June 2002 charging respondent with failure to pay child support applied to the period March 15, 2001 through June 10, 2002. The criminal case concerned a different period of time; furthermore, respondent's failure to comply with the support order during period following the filing of the petition could not have been adjudicated in that matter. The doctrine of res judicata is inapplicable under the circumstances. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994).

The FOC records demonstrated that in the two-year period prior to the filing of the petition, respondent made regular child support payments. Respondent states without substantiation that he was unable to cover the child under his health insurance because Jennifer Horton refused to give the child's social security number to the insurance representative.

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<sup>1</sup> Petitioners erroneously state that respondent pleaded guilty to the charged felony of failure to pay child support, MCL 750.165. The judgment of sentence indicates that respondent pleaded guilty to attempted failure to pay child support, which is considered to be a misdemeanor. MCL 750.92(3).

However, respondent's assertion that he was not presented with any bills for the child's unreimbursed medical expenses until November 2004 is supported by documentation. The trial court did not clearly err in finding that petitioners failed to prove by clear and convincing evidence that respondent failed to comply with the support order.

Respondent acknowledges that he has not had visitation with the child for several years, but notes that the support order suspends his parenting time if a child support arrearage exists. The trial court correctly concluded that it was not required to address the issue of respondent's lack of contact with the child in light of its finding that petitioners could not establish that respondent failed to comply with the support order. *In re ALZ*, *supra* at 272.

An attorney's signature on a document, or a party's signature if the party is not represented by an attorney, constitutes a certification that: (1) the signor has read the document; (2) to the best of the signor's knowledge, information and belief after reasonable inquiry, the document is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. MCR 2.114(D). If a pleading is signed in violation of this rule, the party or attorney, or both, must be sanctioned. MCR 2.114(E). A party pleading a frivolous claim is subject to costs under MCR 2.625(A)(2). MCR 2.114(F); *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). A claim is frivolous when: (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). A trial court's finding that a claim was or was not frivolous will not be reversed on appeal unless it is clearly erroneous. *Id.* at 661.

The trial court did not clearly err by declining to impose sanctions. Petitioners argued that respondent's failure to provide insurance for the child constituted a failure to provide support as that term is defined by MCL 552.602(ee). Petitioners' claims were without merit; however, we conclude that the trial court did not clearly err by finding that the petition did not violate MCR 2.114(D). Furthermore, no evidence supports a finding that petitioners filed their petition primarily to harass or injure respondent, notwithstanding the fact that the petition sought termination of respondent's parental rights. We find that the trial court did not clearly err by finding that the petition did not violate MCR 2.114(F).

Affirmed.

/s/ Peter D. O'Connell  
/s/ Bill Schuette  
/s/ Stephen L. Borrello